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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-312

ALCAN SALES DIV. OF ALCAN ALUMINUM CORPORATION,
Petitioner,

vs.

UNITED STATES,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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This Reply responds to the Government's arguments in opposition to certiorari which were not considered in the Petition.

The principal contention of the Brief in Opposition (herein "Gov't Brief") is that the *Yoshida* decision of the Court of Customs and Patent Appeals—upholding the presidential surcharge on imports under Section 5(b) of the Trading with the Enemy Act ("TWEA")—"is of no continuing substantial importance" and "has little if any prospective significance" (Gov't Brief, 6, 7), primarily because of two post-surcharge statutes, one enacted before and one after the *Yoshida* decision (Gov't Brief, 12-13).

The first statute, the Trade Act of 1974, Pub.L. 93-618, 88 Stat. 1978, while authorizing the President to impose certain limited import surcharges in the future, expressly was intended to have no effect on the pending *Yoshida*

litigation, which involved presidential power under other statutes. The second, the National Emergencies Act, Pub. L.94-412 (to be codified in 50 U.S. C. § 1601) (September 14, 1976), did not legitimate or even affect the *Yoshida* gloss on Section 5(b) of the TWEA as authority for Proclamation 4704.

Yoshida remains unimpaired by either of those two statutes; renders them of no continuing significance where the President seeks to levy import duties on the basis of a declared emergency; and, unless overturned by this Court, will stand as a charter for abuse of Executive power.

I. The Trade Act of 1974

Section 122 of the Trade Act of 1974, 19 U.S.C. § 2132 (Supp. IV 1974), authorizes the President to impose an import surcharge of not more than 15 percent ad valorem, for not more than 150 days, if import restrictions are required to (1) deal with United States balance-of-payments deficits; (2) prevent imminent serious dollar depreciation; or (3) cooperate with other countries to correct an international balance-of-payments disequilibrium. The Government argues that this Congressional action renders the *Yoshida* decision of no continuing importance and of little prospective significance and its review unnecessary (Gov't Brief, 6-7). The argument is untenable.

In enacting Section 122, Congress made clear that it did not intend thereby to affect the pending *Yoshida* litigation.[1] Indeed, in Section 611 of the same act, Pub. L. 93-618, 88 Stat. 1978 (1975), Congress extended from two to five years the time limit for administrative review of protests against Proclamation 4074 surcharge levies. The extension was granted to "permit the resolution of [the *Yoshida*] appeal and any subsequent appeals without denying the thousands of protests already made."[2]

[1] S.Rep. No. 93-1298, 93d Cong., 2d Sess. 88, *reprinted in* [1974] 4 U.S. Code Cong. & Ad. News 7186, 7237.

[2] *Id.* at 235, 4 U.S. Code Cong. & Ad. News at 7363.

Despite Section 122 of the Trade Act of 1974, the President retains today any power that he had in 1971 to impose import duties under Section 5(b) of the TWEA.[3] The *Yoshida* decision is based on the notion that there are two overlapping sources of presidential power to affect customs duties, the first being trade legislation with its guidelines and limitations (such as the Tariff Act of 1930, Trade Expansion Act of 1962, and Trade Act of 1974) which is effective in "normal" times, and the second being Section 5(b) of the TWEA, without such guidelines and limitations, which supersedes during "emergencies." (Petition, App. 27a-28a). As long as *Yoshida* stands and these dual powers persist, the tariff authority so carefully delegated under provisions such as Section 122, with its attendant limitations and safeguards, may be completely overridden by Section 5(b) powers in a declared emergency. The Trade Act of 1974 is purely trade legislation, does not deal with emergency powers, and does not mention, much less amend, Section 5(b). It was adopted at a time when the surcharge imposed by Proclamation 4074 had been held invalid by the Customs Court under both the trade laws and the TWEA.

This means that the President could choose to impose future surcharges under Section 5(b) rather than Section 122 in order to levy duties of over 15 percent ad valorem or for over 150 days, or to impose a surcharge for some purpose other than those to which presidential power is restricted by Section 122.

The "prospective significance" of the *Yoshida* decision was recently attested by reliance upon it in an opinion by the Office of Legal Counsel of the Department of Justice as authority for President Ford's issuance, under Section

[3] It is our position that the President never had any surcharge power under Section 5(b). On the other hand, the Government, despite the passage of the Trade Act of 1974, has described the President's Section 5(b) power to regulate imports as "plenary." Brief for Petitioner at 51, Federal Energy Administration v. Algonquin SNG, Inc., 95 S. Ct. 2295 (1976).

5(b), of Executive Order 11940 of September 30, 1976, 41 Fed. Reg. 43707 (1976), continuing in effect all regulations issued pursuant to the recently lapsed Export Administration Act of 1969, as amended, 50 U.S.C. App. § 2401 (1970).[4] The *Yoshida* decision is viewed by the Executive branch as a grant of presidential power to regulate trade under Section 5(b) even in areas where Congress has exercised a legislative prerogative to end such regulation.

II. The National Emergencies Act

The Government also argues (Gov't Brief, 12-13) that the exemption of Section 5(b) from the provisions of the National Emergencies Act, Pub. L.94-412 (to be codified in 50 U.S. C. § 1601) (September 14, 1976) ("NEA"), confirms that Proclamation 4074 was within the authority Congress intended to delegate in Section 5(b). This can not be so.

First, the Act quite obviously is aimed at curtailing the use of the President's national emergency power. The Report of the Senate Committee on Government Operations noted that the NEA "is not intended to enlarge or add to Executive power"[5] and that certain laws containing the national emergency power, including Section 5(b) of the TWEA, had been used "often in ways not envisioned in the original legislative histories."[6] Second, although Congress did exempt the powers and authority conferred by Section 5(b) of the TWEA from the provisions of the NEA,[7] it did so only to avoid disruption of the day-to-day operations of Governmental departments.[8]

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[4] Letter from Antonin Scalia, Ass't Att'y Gen'l, to J. T. Smith, Gen'l Counsel of Dep't of Commerce, Sept. 29, 1976, *reprinted at* Int'l Trade Rep. (BNA) M-1 (Oct. 19, 1976).

[5] S.Rep. No. 94-1168, 94th Cong., 2d Sess. 3 (1976).

[6] *Id.* at 8.

[7] Pub. L. 94-412, § 502.

[8] *Id.* at 7. *See also* 121 Cong. Rec. H8329 (remarks of Rep. Flowers), H8329 (remarks of Rep. Mazzoli), H8330 (remarks of Rep. Hutchinson) (daily ed., Sept. 4, 1975); 122 Cong. Rec. S14842 (daily ed. Aug. 27, 1976) (remarks of Sen. Church).

Third, Congress refused to exempt Section 5(b) totally from the provisions of the NEA requiring termination within two years of all existing declared emergencies. Instead, Congress allowed certain emergency provisions of law, including Section 5(b), to remain effective, pending conversion of those provisions eventually deemed worth preserving into "standard, non-emergency" laws.[9] However, the expectation that Congress will legislate is no guarantee that it will ever do so. The NEA requires only that appropriate Congressional committees study and investigate and then report; Congressional action, if any, following such reports could take an indefinite period of time.

In the meantime, while the *Yoshida* decision continues as the last word, the President is free to assume a prerogative reserved by the Constitution to Congress.

Respectfully submitted,

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[9] H.Rep. No. 94-238, 94th Cong., 1st Sess. 11 (1976); *see also* 121 Cong. Rec. H8329 (daily ed. Sept. 4, 1975) (remarks of Rep. Flowers).